

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 61  
5549168

BETWEEN ALANA JACKSON  
Applicant

A N D LEANNE GARDINER t/a HAIR  
ON BRIGHTON  
Respondent

Member of Authority: Helen Doyle

Representatives: Ashley-Jayne Lodge and Christopher Newman, Counsel  
for Applicant  
Respondent in person

Submissions Received: 22 April and 10 May 2016 on behalf of Applicant  
3 May 2016 and 5 May 2016 from the Respondent and  
her solicitor

Date of Determination: 13 May 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A Leanne Gardiner is ordered to pay to Alana Jackson the sum of \$6000 for costs and \$71.56 for reimbursement of the filing fee.**

[1] In my determination dated 6 April 2016 I found the applicant had made out her unjustified dismissal grievance and ordered payment for reimbursement of lost wages and compensation. I reserved the issue of costs and set a timetable failing agreement. The Authority has now received costs submissions from Ms Lodge on behalf of the applicant and from Ms Gardiner.

**Applicant's submissions**

[2] Ms Lodge submits that the applicant's actual costs are \$17,406.50 including GST and disbursements.

[3] She submits costs should be awarded on an indemnity basis because there was a *Calderbank* offer in a letter dated 7 July 2015 or alternatively if there is not to be indemnity costs then costs should be awarded on a tariff basis applying an increased notional daily tariff and an increased number of days.

[4] Ms Lodge submits that two senior Counsel were instructed at different times on the matter with two different charge rates of \$280 per hour and \$310 per hour.

[5] Invoices attached to submissions confirm that after the lodging of the statement of problem legal costs were incurred in the sum of \$17,406.50 inclusive of GST and disbursements. Ms Lodge submits that such costs were reasonably incurred.

[6] Ms Lodge refers to the judgment of the Employment Court in *PBO Ltd (formerly Rush Security) v. Da Cruz*<sup>1</sup> and the judgment in *Fagotti v. Acme & Co Ltd*<sup>2</sup> which confirmed the principles in *Da Cruz* to apply to costs in the Authority.

[7] Ms Lodge also relies on the respondent's failure to lodge briefs of evidence within the required timeframe in the notice of direction.

[8] Ms Lodge seeks indemnity costs, but in the alternative an increase to the notional daily tariff. Ms Lodge submits that there should either be indemnity costs in the sum of \$17,406.50 or an increased daily tariff of \$7,500 over two days, being a total of \$15,000.

### **Respondent's submissions**

[9] Ms Gardiner submits that she did not receive the letter of 7 July 2015 and suggests in all likelihood this was because her solicitor, Tim McGinn, did not continue to be instructed due to the business not having any money and being on the verge of closing down.

[10] Ms Gardiner submits that Hair on Brighton is a small salon and not a large company and that this could end her business in which she has her savings invested and the amounts being sought by the applicant are unjustified.

[11] Mr McGinn confirmed in an email to Ms Lodge and the Authority that he had received the *without prejudice save as to costs* letter dated 7 July 2015. He stated that

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<sup>1</sup> [2005] 1 ERNZ 808

<sup>2</sup> [2015] NZEmpC 135 at [144]

he did not forward the letter to Ms Gardiner, but discussed it with her and that he noted that the letter did not amount to an offer to compromise the claim as the remedies sought mirrored those in the statement of problem. He suggests, arguably, the letter went further by including a costs contribution greater than the daily tariff. In his email Mr McGinn suggests that Ms Gardiner could not be criticised in a costs setting for not accepting the proposal to settle.

### **Determination**

[12] *Da Cruz* provides principles to be applied by the Authority in exercising its discretion as to costs. Costs are not to be punitive or express disapproval of a party's conduct although conduct which has increased costs unnecessarily can be taken into account. Frequently costs are assessed against a notional daily tariff which is recognised as \$3,500. Awards in the Authority are generally modest.

[13] I accept that this is a case where the applicant was successful and there is no good reason why costs should not follow the event.

[14] The letter of 7 July 2015 sent to Mr McGinn contained a *Calderbank* offer. It provided that if the offer was not accepted then full indemnity costs would be sought if the applicant was successful to the same level or greater than the offer. At the date of the letter the parties had attended mediation but the matter remained unresolved. There had been an earlier telephone conference with the Authority and the matter was set down on 22 September 2015 for an investigation meeting with a timetable for an exchange of statements of evidence from early September 2015.

[15] The offer expressed to be in full and final settlement of all matters was a payment under s 123 (1)(c)(i) of \$8000, payment of three weeks lost wages in the sum of \$2,160 gross and a contribution towards legal costs of \$4000 plus GST. The offer was expressed to remain open until Thursday 9 July 2015 at 5pm after which time it would expire. The offer was not repeated.

[16] The awards made by the Authority were for reimbursement of the sum of \$2485 gross wages and payment of \$8000 compensation.

[17] The offer did, as Mr McGinn set out in his email, reflect the remedies sought in the statement of problem with a figure for costs. I do not agree with Mr McGinn that in those circumstances the Authority will always conclude it is not unreasonable

for that offer to be rejected. The subsequent award made by the Authority supports the realistic nature of the amounts claimed in the original statement of problem which in turn should have given rise to serious consideration of the offer. The statement of problem was subsequently amended to increase the amount claimed for compensation. I do have some disquiet about the short period the offer was open given that the investigation meeting which was subsequently adjourned was not until September 2015. There was no response that I was provided with to the offer to settle and I cannot safely conclude that Mr McGinn considered the time frame inadequate for consideration and response. He had managed to discuss it with Ms Gardiner.

[18] Clearly if the offer had been accepted then the applicant would not have incurred the additional costs that she did when the matter went to an investigation meeting. In the exercise of my discretion the letter of 7 July is a factor to be taken into account.

[19] Ms Lodge seeks indemnity costs. A *Calderbank* offer does not guarantee an award of indemnity costs and I do not find in this case there was the sort of conduct that would attract an indemnity award.

[20] The appropriate assessment of costs is on the basis of the daily tariff of \$3,500 and consideration of adjustment from that point. My minute book reflects that the investigation meeting started at 9.30am. There was an adjournment for lunch between 1.15pm and 2pm and then submissions with a finish time of 2.15pm. The time was about two hours shorter than a usual full day.

[21] The respondent did not lodge statements of evidence but relied on the statement in reply resubmitted which was quite detailed. I accept that the applicant who had provided statements of evidence was somewhat disadvantaged by that in her preparation for the matter. Other than that it was a relatively straightforward matter devoid of legal complexity even allowing for a number of witnesses on behalf of the applicant.

[22] I have had regard to the two Authority determinations that Ms Lodge referred me to. *Faulkner v Secretary for Justice*<sup>3</sup> was a two day matter which included factual and legal complexity. There was a *Calderbank* offer in that matter and it was found that a significant adjustment should be made because of the reasonable offer to settle

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<sup>3</sup> [2011] NZERA Auckland 324

upwards from the then daily tariff rate \$3000 to \$7,500 with that increased figure applied over the two investigation meeting days required.

[23] The second Authority determination Ms Lodge refers to is *Lloyd-Barker v The SPCA*<sup>4</sup> which was a one day matter and taking a Calderbank offer into account an appropriate award for what was described as a substantial one day hearing was made for \$7000.

[24] In this case there was a reasonable offer by way of a *Calderbank* offer by the applicant to settle at an early stage before costs escalated. The Authority made almost identical monetary awards to those the applicant was prepared to settle for much earlier and she had to incur significant additional costs to achieve that result. In the exercise of my discretion as to costs I do intend to take that offer into account.

[25] I am somewhat unclear why Ms Lodge submits that an increased tariff of the same amount over two days is appropriate. Even including submissions and a number of witnesses for the applicant who were all helpful a full day of investigation was not required.

[26] I have had regard to Ms Gardiner's statement about the financial situation of the business. There is though no evidence about that beyond the statements in the submissions.

[27] I do not find that an increase from \$3,500 to \$7000 is justified in this case as it was not a case where a full day was required. Taking the *Calderbank* offer into account I intend to assess costs based on a full day at \$3,500 and then increase by \$2500 to arrive at an appropriate award for costs of \$6000. The applicant is also entitled to reimbursement of the filing fee of \$71.56.

[28] One of the concerns in this case is that the applicant's outlay in costs exceeded the awards made by the Authority. I am mindful of what the Employment Court stated in *Mattingly v Strata Title Management Ltd*<sup>5</sup> ...*It is not the function of a costs award to address any perceived deficiencies in the relief otherwise awarded to a successful party, much as it is not the function of a costs award to punish an unsuccessful party.*

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<sup>4</sup> AA 12A/10 5159378

<sup>5</sup> [2014] NZEmpC 15 at [13]

[29] Leanne Gardiner is ordered to pay to Alana Jackson costs in the sum of \$6000 and disbursements in the sum of \$71.56.

Helen Doyle  
Member of the Employment Relations Authority